NO. 20893

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHELE MARCHESE,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents-Appellees.

JESSE DEL BONO,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents-Appellees.

APPELLEES' BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEES' BRIEF

I

STATEMENT OF PLEADINGS AND FACTS CONCERNING BASIS OF JURISDICTION

On November 10, 1965, each appellant filed, in the United States District Court for the Southern District of California, Central Division, a document entitled "Motion to File Amended Findings of Fact and Conclusions of Law and Judgment or in the Alternative to Treat Motion as New Supplemental Motion Under Sections 2243 and 2255 Title 28, U.S.C." [C.T. 143 and 253]. 1/ Amended findings of fact and conclusions of law, and amended judgments, were lodged simultaneously therewith [C.T. 166-178, 258-268]. The

1/ Clerk's Transcript.

Government filed an opposition to the two motions on November 19, 1965 [C. T. 151], and, after hearings before the Honorable Thurmond Clarke, United States District Judge, they were denied on January 19, 1966, and again on January 20, 1966 [R. T. 1966, 32, 42]. 2/ An order nunc pro tunc denying the motions and "certifying" the cases to the Court of Appeals for the Ninth Circuit for clarification of its decision, opinion and remand in United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965), was entered April 26, 1966 [C. T. 207]. Notice of appeal to this Court were timely filed on January 20, 1966 [C. T. 195 and 277].

At the time the aforementioned motions were made, and at all times thereafter, appellants were at large on bail [C. T. 140, 207, 209]. Thus the District Court was without jurisdiction to entertain the subject motions on the merits under 28 U. S. C. §§ 2241, 2243 or 2255. (See Argument, Point "D", infra.) This Court's jurisdiction is based upon 28 U. S. C. §§ 1291 and 1294.

II

STATUTES INVOLVED

Title 28 U. S. C. § 2106, which provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and

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2/ Reporter's Transcript, 1966 Proceedings.

may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 28 U. S. C. § 2241, which provides in part:

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
>
> * * *
>
> "(c) The writ of habeas corpus shall not extend to a prisoner unless --
>
> * * *
>
> "(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . . ."

Title 28 U. S. C. § 2243, which provides in part:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

* * *

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Title 28 U. S. C. § 2244, which provides:

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

Title 28 U. S. C. § 2255, which provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized

by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar

relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied his relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

III

STATEMENT OF THE CASE

A. History of Prior Proceedings.

The history of the Marchese and Del Bono cases up to June 1963 is set forth in this Court's opinion in United States v. Marchese, 341 F. 2d 782, 784-786 (9th Cir. 1965), as follows:

"(1) On June 16, 1958, appellees [appellants herein] were each convicted following a jury trial for violation of 18 U. S. C. § 371 and 21 U. S. C. § 174 -- sale of more than two pounds of heroin.

"(2) The judgments of conviction were affirmed by this court per curiam on April 15, 1959 [Marchese v. United States, 264 F. 2d 892 (9th Cir. 1959)].

"(3) Petitions for certiorari were denied by the United States Supreme Court -- Marchese v. United States, 360 U. S. 930, 79 S. Ct. 1447, 3 L. Ed. 2d 1543 (1959); Del Bono v. United States, 360 U. S. 938, 79 S. Ct. 1463, 3 L. Ed. 2d 1550 (1959).

"(4) Marchese and then Del Bono filed motions to annul, vacate and set aside their judgments of conviction under the provisions of 28 U. S. C. § 2255 . . . . Both were denied on December 22, 1960 by the Honorable Thurmond Clarke, the same judge who had tried the appellees earlier. No appeal was taken by either appellee.

"(5) On February 3, 1961, each filed motion for reconsideration of the court's order denying the § 2255 motions. On March 14 and 15, 1961, each was again denied.

"(6) On June 20, 1961, Marchese filed a petition for a writ of habeas corpus. This was denied by another district court judge, the Honorable Peirson M. Hall. Marchese appealed, and this court affirmed that denial. [Marchese v. United States, 304 F. 2d 154 (9th Cir. 1962)].

"(7) Marchese then filed a petition in the United

States Supreme Court for a writ of certiorari.

"(8) Del Bono had meanwhile filed a new motion under 28 U. S. C. § 2255, which was denied by Judge Thurmond Clarke on December 27, 1961. No appeal was taken.

"(9) The United States Supreme Court granted Marchese's petition for certiorari, and remanded the case to the district court for 'reconsideration in the light of Sanders v. United States, 373 U. S. 1 [83 S. Ct. 1068, 10 L. Ed. 2d 148].' " [Marchese v. United States, 374 U. S. 101, 83 S. Ct. 1686, 10 L. Ed. 2d 1026 (1963)].

On September 30, 1963, subsequent to the remand by the Supreme Court and following a hearing in the District Court, Judge Clarke ordered appellant Marchese's ten year sentence "modified, reduced and corrected to be five years", and further ordered appellant Marchese ". . . immediately released from custody", by judgment entered September 30, 1963 [C. T. 129]. Findings of fact and conclusions of law were filed at the same time [C. T. 120]. Thereafter, on November 12, 1963, appellant Del Bono filed a "Petition to Annul, Vacate and Set Aside and/or Modify the Judgment of Conviction Rendered Herein in case No. 26762-CD . . . Pursuant to the Provisions of Title 28, U. S. C. A., Section 2255 and Section 2243" [C. T. 211]. Following a hearing Judge Clarke granted the Del Bono petition, by written order of December 18,

1963, entitled "Order Granting Motion for Modification of Sentence" [C. T. 236]. Then on December 20, 1963, Judge Clarke signed Findings of Fact and Conclusions of Law and a Judgment, which ordered relief identical to that previously provided appellant Marchese [C. T. 238-245].

The petition which obtained for appellant Marchese his release from custody was based upon the following grounds:

1. The judgment of conviction by the use of "silver platter" evidence was in violation of the Due Process Clause of the Constitution of the United States;

2. The use by the Government of an informant, one Donald Sussman, for the purpose of ensnaring Marchese was pursuant to an agreement and conspiracy between him and federal and state authorities, whereby he would receive money, narcotics, favoritism and leniency, in return for his cooperation;

3. During Marchese's trial, the Assistant United States Attorney abused the privileges of his office by actively participating in the suppression of the truth and failing to disclose the truth concerning an agreement or understanding between Sussman and the federal and state authorities, contrary to his oath of office and in disregard of Marchese's constitutional rights under the Fifth Amendment;

4. The use of evidence obtained by an electronic transmitting device known as a Schmidt transmitter was unlawful and violative of the Fourth Amendment of the Constitution and hence could not support the judgment of conviction;

5. The arrest of Marchese without a warrant of arrest, the search of his person and of his apartment, along with the search of an automobile driven by Del Bono, as well as other searches without a search warrant, were all in violation of the Fourth Amendment;

6. Evidence obtained by an unauthorized interception of a telephone conversation was in violation of 47 U.S.C. § 605 [C.T. 2, 13-14].

The Del Bono petition was founded upon grounds the same as grounds three and four of the Marchese petition, supra [C.T. 211, 219-222].

With respect to both appellants, the findings filed in the 1963 proceedings set out at length the "facts" upon which each of the above grounds was based [C.T. 120, 238; United States v. Marchese, 341 F.2d 782, 790-793 (9th Cir. 1965)]. The conclusions of law drawn therefrom, identical in the case of each of the appellants, stated, in effect, that the District Court had jurisdiction to grant the requested relief either on a petition for writ of habeas corpus, or on a Section 2255 motion; that their constitutional rights to a fair trial were so denied and infringed as to render their

convictions subject to collateral attack and that their rights under the Fourth and Fifth Amendments were so denied and infringed as to amount to a denial of due process of law in violation of the Fourteenth Amendment; and, finally, that it would be fair, equitable and just to modify, reduce and correct their sentences, and that their immediate release from custody would be appropriate because of "good time" earned [C. T. 120, 126-127, 238, 244-245].

From the judgments of the District Court, appeals were taken by the United States to the Court of Appeals for the Ninth Circuit, notices of appeal having been timely filed on November 27, 1963 with respect to Marchese, and February 17, 1964 with respect to Del Bono [C. T. 136, 248]. The Government's opening brief on those appeals (Nos. 19172 and 19249) raised and discussed the following points:

"A. The judgments of the District Court 'modifying and reducing' appellees' sentences and awarding them 'good time', exceeded the statutory jurisdiction conferred by Title 28 U. S. C. Section 2255.

* * *

"B. Title 28 U. S. C. Section 2255 may not be invoked to relitigate questions which were or should have been raised on a direct appeal from the judgment of conviction.

"C. Appellees have alleged but have not proved such a denial or infringement of their

constitutional rights as would render their conviction vulnerable to collateral attack.

* * *

"D. The findings of fact were 'clearly erroneous' within the meaning of Rule 52a, Federal Rules of Civil Procedure. * * * " (Appellants' Opening Brief, Appeals Nos. 19172 and 19249, pp. 23-78).

Under Point "C", the Government critically analyzed each of the six grounds for relief urged by Marchese in his petition, listed above.

On February 10, 1965, this Court rendered its decision in United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965). It was simply, that "[e]ach judgment is reversed, and appellees ordered remanded to custody forthwith". 341 F. 2d at 801. Rehearing was denied, on March 3, 1965. A petition for a writ of certiorari was denied by the Supreme Court. Marchese v. United States, 382 U. S. 817, 15 L. Ed. 2d 64 (1965).

The sequence of subsequent events has been recounted in the Statement of Pleadings and Facts Concerning Basis of Jurisdiction, supra. It should be noted that at the hearings in the District Court on January 19 and 20, 1966, Judge Clarke spread the mandate of this Court, in addition to denying appellants' motions [R. T. 1966, 32, 42].

At the January 5, 1966, hearing on appellants' motions to file amended findings, etc., Mr. Hochman, one of Marchese's

attorneys, summarized their position as follows:

"First of all, we argue that the court does have jurisdiction within the law of the case, and in general, to review and to free these men in accordance with the amended findings of fact, conclusions of law, and proposed judgments as now prepared.

"Secondly, and in the alternative, if in the interpretation of what is the jurisdiction of the court, the court feels that it does not have that particular jurisdiction, the court does have jurisdiction to treat the moving papers as an alternative writ, since it has been long held that there is no res judicata on these particular matters.

* * *

"Now, what the Court of Appeals, we feel, was saying here was that of the four alternatives available to the [District Court] [i.e., "(1) 'vacate and set the judgment aside and * * * discharge the prisoner,' or (2) 'resentence him,' or (3) 'grant a new trial,' or (4) 'correct the sentence,' " -- quoting from portion of opinion in United States v. Marchese, supra, 341 F. 2d at 787-788, wherein this Court sets out the kinds of relief authorized by Section 2255], had this Court availed itself of alternative (1), (2) and (3), it is our considered opinion and judgment that the order of the court would have been affirmed.

" . . . The Court of Appeals then proceeds on page 20 of the corrected slip opinion to set forth what has troubled petitioners herein. I quote from page 20 of the corrected slip opinion [United States v. Marchese, supra, 341 F. 2d at 794, wherein the deficiencies in the findings of fact filed in 1963 are discussed].

* * *

" . . . That there were no conclusions of law predicated on the findings of fact with which the Circuit could address itself, in our considered opinion, commends itself to your Honor in view of the present amended findings of fact, conclusions of law, proposed to your Honor, that had these conclusions of law been in ab initio, your Honor would have been affirmed. And in that they are now more important, if your Honor grants petitioners' request, your Honor would be affirmed.

" . . . The whole problem of the Schmidt radio receiver and overheard telephone conversations will again be litigated in our District Courts, in the Court of Appeals for this Circuit, and undoubtedly before the Supreme Court." [R. T. 1966, 5-12].

Mr. Parsons, counsel for Del Bono, made, among others, the following statements at that hearing:

"Then in reversing the judgment the Circuit

Court stated:

> " 'Having determined that the District Court erred in one, exceeding its jurisdiction in granting unauthorized relief; two, making insufficient findings to permit this court to ascertain upon what its conclusions were based;' -- [Quoting from United States v. Marchese, supra, 341 F. 2d at 801]

obviously we respectfully contend that this court is with jurisdiction, and while they didn't say so in so many words, it is almost a direction for this matter to be reheard by this court and proper findings and conclusions upon which they could base proper findings be drawn.

" . . . In reversing this judgment we think that the Circuit Court disregarded longstanding rules regarding the respective rights and duties of both appellate and trial courts.

* * *

"The trial court may draw inferences favoring either party, and unless clearly erroneous the findings and conclusions based thereon will not be disturbed on appeal. * * * " [R. T. 1966, 12-16].

At the hearing held on January 19, 1966, the District Court stated its views as follows:

"We have given a great deal of thought to this matter, and about all I can say is the Circuit decision, in other words, seems to bind the Court. I feel that it is somewhat ambiguous, but there is nothing I can do. So all I can do is have the petitioners' motions denied and the defendants remanded . . . ."

[R. T. 1966, 29-30].

During that hearing, the Court expressed further concern regarding its duties under the Mandate of this Court:

"MR. MARKS [Counsel for Marchese]: Well, this is the problem: . . . The opinion of the Circuit Court is somewhat ambiguous and it is not quite clear what discretion this court has under the circumstances. Therefore, I think this court has the power to certify that question back to the Circuit Court to clarify for this court's satisfaction what it has the power to do under the circumstances of the mandate to this court.

"THE COURT: Well, I can do that automatically, by spreading the mandate, certifying it back to the Circuit Court and, also, at that time approve the bonds.

* * *

"THE COURT: Well, I imagine Mr. Hochman's thought is that it might help somebody up there in the Circuit Court if I certify it, that they will give it their undivided attention.

* * *

"THE COURT: I stated it is rather ambiguous, I stated that right from the bench; and I think that will be a fair matter, and then that will give them another look at it, is really what it amounts to." [R. T. 1966, 37-38].

Appellants are presently at large, the District Court having ordered that they remain on bail pending the instant appeal [C. T. 207].

IV

SUMMARY OF ARGUMENT

The District Court was obligated to follow the mandate of this Court, and thus properly refused to grant relief inconsistent therewith. The decision of this Court in United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965), ordered appellants remanded to custody forthwith, and did not contemplate any remand of the cause to the District Court for further proceedings, or for the filing of amended findings of fact, conclusions of law, or judgments.

The several grounds for relief urged in the petitions granted by the District Court in 1963 were, with one exception, held in United States v. Marchese, to be insufficient as a matter of law, particularly where they were in fact raised on prior appeals and determined adversely to appellants. There was only one ground

which could, if proven, have compelled their release from custody, and the District Court's finding with respect to it was held by this Court to be totally without evidentiary support. The amended findings of fact and conclusions of law sought to be filed by appellants reveal no new grounds.

In view of this Court's decision and opinion in United States v. Marchese, the instant appeal represents an improper attempt to relitigate issues which have been conclusively laid at rest.

V

ARGUMENT

A. EVERY ISSUE RAISED BY THE AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH APPELLANTS HAVE SOUGHT TO FILE WAS DETERMINED ADVERSELY TO THEM IN UNITED STATES v. MARCHESE, 341 F. 2d 782 (9th Cir. 1965), AND THE AMENDED FINDINGS AND CONCLUSIONS FAIL TO DISCLOSE ANY BASES FOR RELIEF UNDER 28 U. S. C. SECTION 2255.

By their motions to "File Amended Findings of Fact and Conclusions of Law and Judgment or in the Alternative to Treat Motion as New Supplemental Motion, etc.", appellants obviously sought to obtain relief from the District Court which was in no way sanctioned in United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965), and totally contrary thereto. Although the motions merely asked permission to "file and lodge" amended findings of fact and conclusions of law and amended judgments, doubtless it was

appellants' hope that these documents would be signed by the District Court, that judgments would be entered, and that they would be once and for all discharged from custody.

Appellants appear to take the position that the decision in United States v. Marchese, amounted essentially to a holding that the original findings of fact and conclusions of law were inartfully drawn, for they say:

> "The language of the Circuit Court, in its opinion, certainly authorizes, if it does not require, the District Court to make new and amended findings of fact and conclusions of law, to render an amended judgment based thereon, and afford relief to appellants within its jurisdiction, power and authority prescribed by this Court under Section 2255.
>
> "In accordance with the requirements of the opinion, appellants moved to file amended findings of fact and conclusions of law [C. T. 166-177, 258-268] and amended judgments [C. T. 179-181, 269-271] wherein the District Court would grant the proper relief permitted or required by the opinion."
> (Appellants' Opening Brief, 30-31).

Following this interpretation of the opinion, they made their motions to file amended findings of fact, conclusions of law, and amended judgments.

On comparing the "amended" findings of fact with those

filed in the 1963 proceedings [C. T. 120-128, 238-245], it becomes apparent that they amount to nothing more than a slightly refurbished presentation of the contents of the prior findings. 3/

Amended Finding I is both a finding and a non-finding. After reciting facts apparently designed to show that the informant had received at least a "hint" that he would be accorded lenient treatment in pending state and federal prosecutions against him, it reads:

> "In view of the opinion and findings of the Circuit Court, this Court now makes no finding on the issue and contention of petitioner that Sussman was promised that he would receive a lighter sentence on the criminal matter then pending if he cooperated with the government agents." [C. T. 168-169, 260-261] [Cf. Finding of Fact I, 1963, C. T. 120, 239).

Amended Finding VI is also a finding and non-finding. It sets forth the facts upon which appellants originally based their claim that the Assistant United States Attorney who prosecuted them suppressed evidence and knowingly failed to disclose the truth

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3/ In both the Marchese and Del Bono cases, the amended findings and conclusions are identical, with the exception of amended finding IX of the Del Bono findings, and finding X of the Marchese findings, both of which concern arrests, searches and seizures. Amended Finding IX of Marchese's amended findings pertains to the overhearing, by a federal agent, of telephone conversations between Sussman and Marchese; no conclusion of law is drawn from it. The amended conclusions of law are identical in both cases [C. T. 166-178, 258-268].

concerning an alleged agreement that the informant would receive leniency in return for his participation in the investigation of Marchese and Del Bono. After quoting from the portion of the trial transcript wherein the alleged suppression took place, Amended Finding VI states:

> "That in view of the findings made by the Circuit Court, this Court now makes no finding on the issue and contention of petitioner that the United States Attorney abused the privilege of his office by suppressing and failing to disclose the truth, and makes no finding as to whether there was an improper agreement between the Assistant United States Attorney and Sussman." [C. T. 171, 263-264] [Cf. Finding of Fact VI, 1963, C. T. 122-124, 240-242].

Amended Findings II through V further elaborate upon the "facts" concerning the relationship between Sussman and the federal and state authorities, particularly with respect to lenient treatment received by him [C. T. 169-171, 261-263] [Cf. Findings of Fact II through V, 1963, C. T. 121-122, 239-240].

Amended Finding VII describes Sussman's bad character, his addiction to, and use of, narcotics, and the government's condoning and consenting to his commission of crimes [C. T. 172, 264] [Cf. Finding of Fact VII, 1963, C. T. 124, 242].

Amended Finding VIII relates facts concerning the use of a Schmidt transmitter, attached to the person of the informant

Sussman, which was employed in obtaining statements made by appellant Marchese in his apartment [C. T. 172, 264-265] [Cf. Finding of Fact VIII, 1963, C. T. 125, 243].

Amended Finding IX describes the activities of a federal agent in placing his ear next to the receiver of a telephone being used by the informant in a conversation with Marchese, so as to overhear what Marchese said, and states that the agent was permitted over objection to testify to what he heard [C. T. 173] [Cf. Finding of Fact IX, 1963, C. T. 125]. 4/

Marchese's Amended Finding X states that he was arrested without a warrant of arrest; that an automobile, not in his possession, was searched without a warrant by Government agents and the informant, and narcotics removed, without a search warrant; and that following Marchese's arrest, his apartment was searched, although no narcotics nor marked money was found [C. T. 173] [Cf. Finding of Fact X, 1963, C. T. 126]. Similarly, Del Bono's Amended Finding IX states that he was arrested without a warrant; and that the aforementioned automobile was searched, and narcotics removed, without a warrant [C. T. 265] [Cf. Finding of Fact IX, 1963, C. T. 243].

Marchese's Amended Finding XI and Del Bono's Amended Finding X set forth their good prison conduct and the quantities of

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4/ In United States v. Marchese, it was pointed out, 341 F. 2d at 789, that the "intercepted" evidence issue had been disposed on the original appeal from the judgments of conviction (Marchese v. United States, 264 F. 2d 892 (9th Cir. 1959)). Again, it is to be emphasized that no conclusion of law was drawn from Amended Finding IX (Marchese).

"good time" earned by them, as well as the amount of time already served by them under their 1958 convictions [C. T. 173, 265] [Cf. Finding of Fact XII (Marchese), 1963, C. T. 126; Finding of Fact XI (Del Bono), 1963, C. T. 243-244].

Marchese's Amended Finding XII and Del Bono's Amended Finding XI state "That the ends of justice are served by inquiring into the merits of this application, whether or not there has been a prior determination on the merits either by appeal or by similar application and that any prior determination, if any on the merits, is not res judicata." [C. T. 173-174, 265] (Emphasis added).

The amended findings vary from the original findings insofar as the "suppression of evidence" ground is concerned, in that they expressly avoid it; otherwise, no changes of any substance can be found.

The amended conclusions of law are considerably expanded, as compared with those filed in 1963.

Amended Conclusion I is, pertinently, as follows:

> "[T]hat by reason of the fact that at the hearing Richards testified that he did in fact tell Sussman he would call to the attention of the United States Attorney whatever Sussman did to make out a case against the source of his supply, and that he would talk to the state officers and see what could be done in Sussman's behalf, . . . and that as a consequence of Richards activities and the carrying out of his promise to Sussman, the latter received

great leniency . . ., the Court concludes it would be fair, equitable and serve the ends of justice . . . to vacate and set aside the judgment of conviction and discharge petitioner." [C. T. 174, 266].

In United States v. Marchese, 341 F. 2d at 797-798, this Court concluded:

> "[T]here was no proof that defendant Sussman was promised 'leniency' as such. He was promised by Richards: (a) that whatever Sussman did to aid the prosecution 'would be brought to the attention' of the United States Attorney; (b) that Richards, the Federal Bureau of Narcotics agent, told the State probation officer Sussman was 'aiding' the federal government, and was giving the federal government, 'help and cooperation'; that he was 'helping', and Bevan, the Assistant United States Attorney did prepare the lesser tax counts for Sussman's plea, and subsequent imprisonment."

The Court held that the foregoing facts, in and of themselves, did not deprive appellants of a fair trial, or deprive them of any of their constitutional rights. 341 F. 2d at 799.

Amended Conclusion of Law II raises the issue whether the use of an informant and "undercover" agent who is known to be a user of narcotics is a denial of "a fair trial and due process". In United States v. Marchese, supra, it was observed that this point had been raised on the original appeal by Marchese and Del Bono

from their convictions. 341 F. 2d at 789. Undoubtedly, it was one of the issues which the Court regarded as so lacking in merit as not to be worthy of further consideration. 341 F. 2d at 789.

Amended Conclusion of Law IV, in connection with Amended Finding of Fact IX, raises the same arrest, search and seizure issues which were before this Court in United States v. Marchese, 341 F. 2d at 787, 793. It is to be emphasized that the search of appellant Marchese's person and apartment at the time of his arrest did not, as stated in both the original and amended findings, result in the discovery of any evidence sought to be used at his trial [C. T. 126, 173]. As for the narcotics which were removed from the automobile "not in Marchese's possession", such removal was accomplished pursuant to Marchese's specific instructions. The informant, Sussman, testified as follows:

> " . . . [H]e [Marchese] told me that a blue 1941 Dodge would be parked in that immediate vicinity at approximately 12:30. . . . And he told me to make sure not to be there before time. After I picked up the package, for me to bring the money to him at his apartment, and knock on the door and just say 'Danny' and he would come out." [Trial R. T. 394-395]. 5/

It was only after receiving these instructions that Sussman retrieved the package from where Marchese had said it would be

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5/ Reporter's Transcript, 1958 Trial of Marchese and Del Bono.

[Trial R. T. 395]. Furthermore, even if this removal were held to amount to an illegal search and seizure, which is not in any way conceded here, it was not one of which Marchese could complain. The general rule in determining whether one is an "aggrieved party" to complain of a search and seizure was stated in Jones v. United States, 362 U. S. 257, 261, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960) as follows:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, on against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) [F. R. Crim. P.] applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection was given.' New York ex rel. Hatch v. Reardon, 204 US 152, 160, 51 L. ed 415, 422, 27 S Ct. 188, 9 Ann Cas 736."

See also:

Ramirez v. United States, 294 F. 2d 277 (9th Cir. 1961).

Here the automobile in question was not in Marchese's possession, and the finding does not indicate that it even belonged to him. In fact, in his original petition, Marchese alleged that it was "driven"

by Del Bono [C. T. 13].

Conclusion V of the Amended Findings of Fact and Conclusions of Law states that in view of the time served by appellants, and by virtue of their good prison records and the accumulation of "good time", it would be "fair, just and equitable and serve the ends of justice to vacate and set aside the judgment[s] of conviction and discharge petitioner[s]". It is curious that appellants should now attempt to rely on such a ground, in view of the fact that it was directly, expressly and conclusively held not to be a basis for collateral relief in United States v. Marchese, 341 F. 2d at 788.

Amended Conclusions of Law III and VI pertain to the use of the Schmidt transmitter. This was another issue disposed of by the Court in United States v. Marchese, 341 F. 2d at 789, as being totally without merit, particularly where it had previously been raised upon appellants' appeal from their judgments of conviction, Marchese v. United States, 264 F. 2d 892 (9th Cir. 1959), cert. den., 360 U. S. 930, 79 S. Ct. 1447, 3 L. Ed. 2d 1543 (1959), and Del Bono v. United States, 360 U. S. 938, 79 S. Ct. 1463, 3 L. Ed. 2d 1550 (1959).

They take the position that the case of On Lee v. United States, 343 U. S. 747, 72 S. Ct. 967, 96 L. Ed. 1270 (1952), is no longer the law, or at least that the instant case is distinguishable. Their primary source of comfort would appear to be Lopez v. United States, 373 U. S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963).

In Lopez, the facts were these: The petitioner, Lopez, offered bribes to an Internal Revenue Agent. The agent pretended

to cooperate with Lopez, and in a subsequent meeting with him, was outfitted with a battery-powered pocket transmitter and a pocket wire recorder. Although the transmitter failed to operate, the wire recorder functioned properly, and recorded a conversation between Lopez and the agent. Prior to trial, Lopez moved to suppress as evidence the wire recording of the aforementioned conversation; however, the motion was denied and the recording received in evidence.

On appeal, Lopez asserted that his constitutional rights under the Fourth Amendment had been violated, his theory being that, in view of the agent's alleged falsification of his mission, he gained access to Lopez' office by misrepresentation, and all evidence obtained there was illegally seized.

Speaking for the majority, Mr. Justice Harlan stated:

> "Davis was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real. Compare Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407. He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge.
>
> " . . .
>
> "Once it is plain that Davis [the agent] could properly testify about his conversation with Lopez, the constitutional claim relating to the recording of

that conversation emerges in proper perspective. . . . Indeed this case involves no 'eavesdropping' whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose.

. . .

"Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment.

. . .

"The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained -- for example, by violating some statute or rule of procedure -- compels the formulation of a rule excluding its introduction in a federal court.

. . .

"When we look for the overriding considerations that might require the exclusion of the highly useful evidence involved here, we find nothing." (Emphasis added). 373 U.S. 427, 438-440.

Concurring in the result, the Chief Justice agreed with the dissent of Mr. Justice Brennan insofar as the continued vitality of On Lee was concerned. 373 U.S. 427, 441. But he distinguished the On Lee case, as follows:

"When On Lee was arrested, the only direct evidence that he was engaged in the distribution of opium was the unreliable testimony of an alleged accomplice who handled the contacts with purchasers. . . . To strengthen its case against On Lee, the Government sent a 'special employee,' one Chin Poy, into On Lee's laundry armed with a concealed transmitter, On Lee being out on bail pending indictment at the time . . . Chin Poy . . . engaged On Lee in conversation for the purpose of eliciting admissions that On Lee was part of an opium syndicate and to encourage him to commit another crime. At trial, instead of calling Chin Poy to testify, the Government put on the narcotics agent who had been at the receiving end of the radio contact with Chin Poy to testify to the admissions made by On Lee . . . .

"The use and purpose of the transmitter in On Lee was substantially different from the use of the recorder here. Its advantage was not to corroborate the testimony of Chin Poy, but rather, to obviate the need to put him on the stand." 373 U.S. 427, 442-443. (Emphasis added)

Quoting from the On Lee Opinion, the Chief Justice pointed out that it was probably to avoid putting such an unsavory character as Chin Poy before the Jury that the transmitting device was used at all. 373 U.S. 427, 443.

In the instant case, the Government had no such ulterior motive in equipping the informant Sussman with the Schmidt transmitter since he was called as a witness and testified at length at the 1958 trial [Trial R. T. 359-399].

It should be noted that appellants, in their Opening Brief herein, make the claim that the instant state of facts is materially distinguishable from those in On Lee:

"On Lee may be distinguished from the instant case in that here the transmission took place in Marchese's private apartment, where in On Lee the transmission took place in the public portion of On Lee's laundry, . . . and also on the sidewalks of New York." (Opening Brief, p. 14).

In the Lopez case, supra, the clandestine recording was made in the petitioner's office. And certainly, where, as here, Marchese elected to ply his trade from his apartment, it is difficult to see

how his apartment could stand on a different footing from an office, where the subject conversations related to "business". Thus the "distinction" they have pointed to is obviously without substance.

It should also be noted, parenthetically, that appellant Del Bono is really in no position to complain about the admission of evidence obtained by use of the Schmidt transmitter, where the relevant findings of fact fail to state that anything said by him was transmitted or received, and in fact that the subject conversations were between the informant and appellant Marchese, and do not indicate that Del Bono was even present when they took place [Amended Finding VIII, C. T. 264].

See: Jones v. United States, supra, 362 U.S. 257, 261, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960);

Ramirez v. United States, supra, 294 F. 2d 277 (9th Cir. 1961).

Appellants have sought to liken the instant case to Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964) and Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964). In Massiah it was held that where, after indictment, the defendant had a conversation in the absence of his retained counsel with one of his codefendants while sitting in the latter's automobile, unaware that, with the codefendant's cooperation, government agents had installed a radio transmitter, the use of evidence obtained by the transmitter was improperly introduced in evidence in that it violated the defendant's Sixth Amendment right to counsel. Escobedo held that a conviction must be

set aside, as violative of the Sixth Amendment, where the accused requested, but was denied, the presence of his lawyer while being interrogated by the police after the investigation had focused on him, and evidence obtained by the interrogation was received at the subsequent trial.

In the case at bar, it does not appear that appellants had been indicted, that they had retained counsel for the purpose of handling their trial, or that they ever made any request to see an attorney at the time the conversations were picked up by the transmitter.

According to the Opening Brief herein, there are cases pending before the Supreme Court of the United States which involve the use of "bugging" and concealed transmitting devices, including Miller v. United States, Black v. United States and Kolod v. United States. As far as counsel has been able to determine, the Black and Kolod cases involve the classic "bugging" or eavesdropping situations. (Nothing could be found on the Miller case.) Corroborative electronic listening aids, such as that involved in the instant case, are an entirely different matter from what was involved in Black and Kolod. At any rate, even in the highly unlikely event that the Supreme Court handed down a decision holding that the use of evidence obtained by such a device as the Schmidt transmitter, under facts similar to the instant case, violated an accused's constitutional rights, it is very questionable whether it would be applied retroactively.

See: Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965);

Johnson v. New Jersey, 16 L.Ed.2d 882 (1966);

Lee v. Wilson, 363 F.2d 824 (9th Cir. 1966);

Lester v. Wilson, 363 F.2d 824 (9th Cir. 1966).

B. IF VIEWED "IN THE ALTERNATIVE" AS "NEW, SUPPLEMENTAL MOTIONS", THE SUBJECT MOTIONS CONSTITUTE AN ATTEMPT TO RELITIGATE MATTERS WHICH WERE DETERMINED ADVERSELY TO APPELLANTS IN UNITED STATES v. MARCHESE, 341 F.2d 782 (9th Cir. 1965).

Even if the motions are to be viewed "in the alternative" as "new, supplemental motions", they offer nothing new. One would expect to find a fresh list of grievances set forth, but they fail to allege a single new ground of relief. Rather, the motions say simply:

> "If for any reason this Court does not believe it has jurisdiction and authority to amend said Findings, Conclusions and Judgment petitioner in the alternative, requests the Court to treat this as a new or supplemental motion under Section 2243 and 2255 of Title 28, U.S.C. and incorporates by reference the original petition and motion except as to that portion thereof: [citing portions to be omitted]." [C.T. 143, 144, 253, 254] (Emphasis added)

It was from the granting of the aforementioned original petitions that the Government appealed in United States v. Marchese. By eliminating the "silver-platter" and suppression of evidence grounds, and seeking relief upon otherwise identical grounds again, after reversal by this Court, appellants were patently attempting nothing more nor less than an evasion of the mandate therein.

C. THE DISTRICT COURT WAS REQUIRED STRICTLY TO FOLLOW THE MANDATE OF THE COURT OF APPEALS, AND COULD NEITHER INTERFERE WITH THE MANDATE NOR DO ANYTHING INCONSISTENT THEREWITH, AND THEREFORE DID NOT ERR IN DENYING APPELLANTS' MOTIONS.

1. Pursuant to the Mandate of the Court of Appeals, the District Court Properly Denied Appellants' Motions.

At the 1966 hearings, the District Court denied the subject motions, and spread the mandate of this Court upon its files and records, although it allowed the appellants to remain on bail, despite the direction of this Court that the appellants be remanded to custody forthwith. United States v. Marchese, 341 F. 2d at 801.

It is well settled that once a decision is finally rendered on appeal, the District Court must strictly follow the mandate of the appellate court and may not grant any relief inconsistent therewith.

Clark v. Travelers Indemnity Co., 328 F. 2d 819 (7th Cir. 1964);

Paull v. Archer-Daniels-Midland Co.,
313 F. 2d 612 (8th Cir. 1963);
Bailey v. Henslee, 309 F. 2d 840 (8th Cir. 1962);
Hartman v. Lauchli, 304 F. 2d 431 (8th Cir. 1962);
See: In re Sanford Fork & Tool Co., 160 U. S. 247, 255,
16 S. Ct. 291, 40 L. Ed. 414 (1897).

As stated in the Paull case, supra, quoting from Thornton v. Carver, 109 F. 2d 316 (8th Cir. 1940):

" 'When a case has been decided by this court on appeal and remanded to the District Court, every question which was before this court and disposed of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution according to the mandate. It cannot alter it, examine it except for purposes of execution, or give any further relief or review it for apparent error with respect to any question decided on appeal and can only enter a judgment or decree in strict compliance with the opinion and mandate.' " 313 F. 2d at 617 (Emphasis added).

Doubtless this Court could have remanded the cause to the District Court for further proceedings, but it did not. Rather, it reversed the judgments and remanded the appellants to custody -- absolutely, unequivocally and finally, as is within its power under Title 28, U. S. C. §2106.

It may be noted that appellants supported their motions to file amended findings, conclusions and judgments by quoting from the opinion in United States v. Marchese, supra, wherein it was said:

> "We can only conclude the findings are not sufficiently clear to permit us to properly evaluate them, and if for no other reason than this, we would be required to reverse judgment and remand for further findings and conclusions." 341 F. 2d at 795.

The above quotation was set forth at page 2 of "Appendix A", annexed to each of appellants' aforementioned motions [C. T. 143, 146, 253, 256]. Certainly the language quoted above means nothing more nor less than what it says, which is simply that if Marchese's petition for writ of habeas corpus, and Del Bono's petition to vacate sentence, had possessed any merit, which they did not, the judgments discharging them from custody would nevertheless require reversal because they were not supported by adequate findings and conclusions as required by Rule 52, Federal Rules of Civil Procedure.

Of all the grounds raised in Marchese's petition for writ of habeas corpus, and Del Bono's petition to vacate sentence, this Court found only one which warranted any consideration by it, and that was whether the Assistant United States Attorney who originally tried the case had suppressed evidence, or knowingly permitted a Government witness to lie on the stand. United States

v. Marchese, supra, 341 F. 2d at 789-790. It held that the District Court's finding with respect to this issue was totally unsupported by the evidence adduced in support thereof. United States v. Marchese, 341 F. 2d at 801.

On the basis of what has been said, it is submitted that the District Court was limited to doing one, and only one, thing, in order to comply with the mandate of this Court, and that was to spread the mandate, as it did in the instant case.

At this juncture, the Court's attention is respectfully directed to points II through VIII of the argument in appellants' Opening Brief, each of which will be analyzed in succeeding pages.

2. Section 2255, Title 28 U. S. C., Cannot Take the Place of An Original Appeal.

Appellants allege as the second point of their Argument that they "had the right to raise a substantial constitutional question, even though said question could have been or was litigated on previous proceedings, including the appeal from the judgment of conviction" (Opening Brief, p. 23).

This point was conclusively answered in the opinion in United States v. Marchese, supra, wherein the Court said:

> "Section 2255 cannot take the place of an original appeal. More properly stated, §2255 may not be invoked to relitigate questions which were or should have been raised on a direct appeal from the

judgment of conviction." 341 F. 2d at 789.

Furthermore, whatever may be said generally with respect to the right to litigate, in a Section 2255 proceeding, issues which were or should have been raised on appeal, it is clear that where, as in the instant case, the mandate of the Court of Appeals, as embraced in its decision and opinion, expressly holds that the District Court erroneously granted collateral relief based on certain specified grounds, the granting of such relief, in an identical kind of proceeding, on identical grounds, should be condemned as nothing short of a direct contravention of the mandate, and a total disregard of the law of the case as established therein.

As held in the cases cited above, the mandate must be followed to the letter. Furthermore, the District Court is absolutely bound to follow the rules of law announced by this Court in its opinion, under the "law of the case" doctrine, in all subsequent proceedings in the same litigation.

Sibbald v. United States, 12 Pet. 488, 492,
9 L. Ed. 1167 (1838);

Fountainbleau Hotel Corp. v. Crossman,
286 F. 2d 926, 928 (5th Cir. 1961);

See: Virginia Electric & Power Co. v. N. L. R. B.,
132 F. 2d 390, 392 (4th Cir. 1942).

As applied vis a vis successive proceedings in the same court, "law of the case" is, no doubt, nothing more than a rule of practice; but as between the Court of Appeals and the District Court, it

dictates that the lower court must precisely follow the principles of law announced by the higher. In Fountainbleau Hotel Corp. v. Crossman, supra, the court quoted Moore as follows, 286 F. 2d at 928:

> "Moore states it: 'When therefore, a federal court enunciates a rule of law to be applied in the case at bar * * * it establishes the law, which other courts owing obedience to it must, and which it itself will, normally apply to the same issues in subsequent proceedings in that case.' 1 Moore, Federal Practice ₱ 0.404 [1]."

Thus the District Court manifestly acted precisely as it must have acted, in denying appellants' motions.

3. Appellants May Not, In a Subsequent Motion Under Section 2255, Relitigate Matters Which Were Determined Adversely to Them On An Appeal From the Granting Of a Previous Section 2255 Motion.

As the third point of their argument, appellants claim that "Any determination made by the Court on a motion under Section 2255 of Title 28, U. S. C., or Habeas Corpus under Section 2243 of Title 28, U. S. C. is not res judicata, and the same question may be raised on subsequent petitions or motions under said sections, especially where constitutional rights have been invaded."

(Opening Brief, p. 26).

Granted, the doctrine of res judicata, as normally understood in civil actions, does not apply. Apparently appellants take this to mean that the District Court should, at the very least, have treated the subject motions "in the alternative" as "new supplemental motions" and given them a full hearing on the "merits" [C. T. 143, 144, 253, 254]. But it is clear that the District Court is "not required . . . to entertain a second or successive motion for similar relief on behalf of the same prisoner" (28 U. S. C. §2255) where, as here, the questions now raised were raised on previous motions, entertained by the District Court, heard on the merits, relief was in fact granted, and the judgments of the District Court in granting such relief were reversed by the Court of Appeals.

Sanders v. United States, 373 U. S. 1, 15, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963);

United States v. Marchese, 341 F. 2d 782, 784-785 (9th Cir. 1965).

4. The District Court Has No "Jurisdiction" or "Power" to Contravene the Mandate of the Court of Appeals Directed to It.

As their fourth point, appellants urge: "The United States District Court, following the opinion and remand by the Circuit Court on the last appeal, had the jurisdiction and power to file

amended findings of fact and conclusions of law, and an amended judgment based thereon, granting to petitioners the relief sought, namely, their full and complete discharge." (Opening Brief, p. 29).

This the District Court had no "power" or "jurisdiction" to do, assuming the amended findings of fact and conclusions of law to which they refer are those they lodged with the subject motions. The content of the amended findings and conclusions was explored in preceding pages, and it was shown that they contain no new matter of any substance.

That being the case, the District Court's signing the amended findings, conclusions, and judgment would have amounted to a repudiation of the mandate of this Court and the law by which further proceedings in the Marchese and Del Bono cases must be governed, as enunciated in the Opinion in United States v. Marchese. It is fundamental that the District Court has no "jurisdiction", "power", or "authority" whatever to contravene the mandate of this Court directed to it, or the law of the case announced in its opinion.

Briggs v. Pennsylvania R. Co., 334 U.S. 304, 68 S. Ct. 1039, 92 L. Ed. 1403 (1948);

Bankers Life and Casualty Co. v. Bellanca Corp., 308 F. 2d 757, 759 (7th Cir. 1962);

Federal Home Loan Bank of San Francisco v. Hall, 225 F. 2d 349, 385 (9th Cir. 1955) (footnote 12);

Butcher and Sherrerd v. Welsh, 206 F. 2d 259, 261-262 (3rd Cir. 1953).

5. The Decision of This Court, Nullifying in Toto the Judgments of the District Court Granting Appellants Their Discharge From Custody, Is Plain and Unambiguous and Does Not Contemplate Any Further Proceedings Below.

Appellants claim, under Point V, that "[s]ince the opinion and remand by the Circuit Court aforesaid was ambiguous, the District Court should have resolved the ambiguity in favor of the petitioners, and should have granted them the relief of a complete discharge, instead of certifying the cases back to the Circuit Court for clarification as to the District Court's power and jurisdiction to determine the matter." (Opening Brief, p. 36). There is nothing ambiguous about the "remand" of this Court in United States v. Marchese, supra. The decision was simply, "Each judgment is reversed, and appellees ordered remanded to custody forthwith".

At any rate, their contention that the District Court should have granted the relief of a complete discharge is a curious way to resolve the supposed ambiguity. Additionally, it is strange that appellants charge error in the District Court's "certifying" the causes back to this Court for clarification, since it was at the suggestion of counsel for appellant Marchese that Judge Clarke "certified" the matter:

"MR. HOCHMAN: Your Honor, would you consider certifying this question to the Court of Appeals. I think it is an interesting jurisdictional question.

"MR. PARSONS: Yes.

. . .

"THE COURT: [A]fter I spread the mandate, then I will certify the matter." [R. T. 1966, 36].

6. Even if Appellants' Motions Had Been Treated As "New" Or "Supplemental" Motions, the District Court Would Not Have Been Justified In Granting Them.

Appellants next assert, as their sixth point, that "[s]ince res adjudicata does not apply to motions under Section 2255 or Habeas Corpus, the District Court should have treated the motions made by the petitioners after remand in the alternative, as new motions under Sections 2255 and 2243 of Title 28, U.S.C., and granted petitioners full and complete discharge as apparently authorized or permitted by the opinion of the Circuit Court." (Opening Brief, p. 39).

With respect to the instant point, it is hard to say whether appellants are claiming the District Court should have granted relief in spite of this Court's mandate, or because of it. On the one hand, they seem to be saying that the District Court should have granted relief whatever may have been the decision of this

Court concerning prior motions for vacation of sentence; and on the other, that the District Court should do so because this Court gave it authority or permission to do so.

As emphasized in preceding paragraphs, the Court of Appeals certainly did not give authority or permission to the District Court to grant further relief based upon any of the grounds contained in the petitions which secured for appellants their discharge from custody in 1963. In fact, the District Court was told that it should not have done so.

With equal emphasis, it is to be pointed out that the District Court was not free to act without regard to the decision of this Court annulling the granting of prior motions or petitions for relief from the imposition of a criminal sentence. The doctrine of res judicata is not at issue. What is at issue is the power and authority of the District Court to deviate from the mandate of the Court of Appeals by granting relief based upon grounds which were previously employed in obtaining relief from a criminal sentence, where such grounds were rejected by this Court in holding that the District Court erred in granting the petitions; and thus ignoring the law of the case.

7. The District Court Had No "Power" Or "Jurisdiction" to Make New Findings of Fact and Conclusions of Law of the Kind Proposed by Appellants.

It is claimed by appellants, as point number Seven, that "[i]f the District Court had treated said motions in the alternative as new motions aforesaid, it had the power and jurisdiction to make new findings of fact and conclusions of law and judgment, based upon matters presented at all of the hearings and upon the record of the case especially with respect to the violation of the petitioners' constitutional rights in connection with the use by the Government of the Schmidt transmitter." (Opening Brief, p. 41).

Under this point, it seems that appellants are alleging that which is implicit in point number six: That the District Court had the power and jurisdiction to do what they claim it should have done. As shown by the cases cited herein under the discussion of the fourth point, it had neither the power nor the jurisdiction to grant further relief, in contravention of the mandate directed to it.

8. This Court's Decision in United States v. Marchese Should Not Be Disturbed.

Finally, as point number eight, appellants state the following: "That the findings of the District Court originally made were not clearly erroneous, and that this Honorable Court should review and revise its decision with respect to the findings made by the

trial court in the light of long established fundamental principles governing appellate powers and procedure with respect to findings of fact." (Opening Brief, p. 42).

This point might best be denominated an appeal from the Court of Appeals to the Court of Appeals. Suffice it to say that as a rule of appellate practice, whatever has been decided on one appeal will not be departed from upon subsequent appeals in the same case.

> Thompson v. Maxwell Land Grant & Railway Co., 168 U.S. 451, 456, 18 S.Ct. 121, 42 L.Ed. 539 (1897);
>
> New York Life Insurance Co. v. Taylor, 158 F.2d 328, 81 U.S. App. D.C. 331 (1946);
>
> Long Beach Dock & Terminal Co. v. Pacific Dock & Terminal Co., 98 F.2d 833 (9th Cir. 1938).

But even if that rule were disregarded here (and appellees by no means suggest in any way that it should be), it is difficult to see how a different result could be reached. In United States v. Marchese, the only findings of the lower court which were held to be without evidentiary support were those relating to alleged promises of leniency to the informant Sussman in consideration of his helping the Government; the alleged knowledge by the Assistant United States Attorney who tried the case of such a bargain, or reason to know thereof; and the purported suppression of evidence concerning the alleged bargain. United States v. Marchese,

341 F. 2d at 795-801. This Court, in six and one-half pages of its opinion, exhaustively reviewed the record, and concluded that appellees (appellants herein) had sought to prove the promise by nothing more than: (1) a denial by a Federal Bureau of Narcotics Agent that it existed; (2) the admitted hope or expectation of the informant Sussman that he would "probably" receive a lighter sentence for his cooperation; and (3) the trial assistant's well-taken and court-sustained objection to a question which called for a witness's conclusion, to-wit, whether an "agreement" existed between Sussman and the agents. United States v. Marchese, 341 F. 2d at 801. This, it was held, was not enough. Finally, as was pointed out in the opinion, nothing was "suppressed" by Government counsel trying the case. 341 F. 2d at 801.

D. THE DISTRICT COURT CORRECTLY DECLINED TO ENTERTAIN APPELLANTS' MOTIONS ON THE MERITS, SINCE APPELLANTS, AT THE TIME THE SUBJECT MOTIONS WERE MADE, AND AT ALL TIMES THEREAFTER, WERE NOT "IN CUSTODY".

This Court, after a hearing on March 2, 1965, ordered appellants' bail reinstated [C. T. 140]. Thereafter, Judge Clarke, at the subsequent hearings in the District Court, ordered that they remain on the same bonds pending the instant appeal [R. T. 1966, 30, 43-44; Order Nunc Pro Tunc, entered April 26, 1966].

The rule is that one is not "in custody", so as to confer upon the court jurisdiction to entertain a motion to vacate sentence under Section 2255, or a petition for a writ of habeas corpus, where he is on bail.

Matysek v. United States, 339 F. 2d 389 (9th Cir. 1964);

See: Heflin v. United States, 358 U. S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959);

Johnson v. Hoy, 227 U. S. 245, 248, 33 S. Ct. 240, 57 L. Ed. 497, 499 (1913).

That being the case, the District Court was plainly without power to grant appellants' motions, or to grant any of the relief prayed for therein. Thus it was limited to denying the motions without approaching the "merits" of the amended findings of fact and conclusions of law which appellants sought to file, or the "merits" of the subject motions if treated as "new, supplemental motions". That it in fact denied the motions "not on the merits" is evidenced by the following recital in the Order Nunc Pro Nunc entered April 26, 1966:

> " . . . [T]he Court held that the decision and order of the Court of Appeals was ambiguous . . . and that the Court was uncertain as to its power . . ., and on that basis, . . . [denied] the motions . . . ." [C. T. 207, 208].

CONCLUSION

Appellees' position may be thus summarized:

1. The amended findings of fact which appellants have sought to file contain nothing of substance new or different from those signed by the District Court in 1963, in support of judgments thereafter reversed in United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965).

2. The amended conclusions of law present no legal issues which were not raised in Marchese's 1961 petition for a writ of habeas corpus, all of which were before this Court and held in United States v. Marchese to be legally insufficient particularly where they had been ruled upon adversely in prior proceedings.

3. The Court of Appeals, in United States v. Marchese, did not remand the cause for further proceedings; rather, it held that appellants [appellees therein] should have received no relief at all.

4. Since this Court held that the District Court should not have granted any relief to appellants upon the facts before it, its doing so upon no new grounds, with no new facts to support its judgments, would constitute a total repudiation of the mandate directed to it.

5. Once a decision is finally rendered on appeal, the District Court must strictly follow the mandate, and may not grant any relief inconsistent therewith.

6. The District Court is bound to follow the law of the

case, as announced in an opinion of the Court of Appeals, in all subsequent stages of the same litigation.

7. The District Court is not required to entertain a subsequent Section 2255 motion or petition for writ of habeas corpus where all grounds pleaded therein were raised on previous motions or petitions, heard on the merits, and judgments were entered on the merits.

8. The District Court has no jurisdiction, power, or authority to depart from the mandate of the Court of Appeals.

9. As a rule of appellate practice, this Court ought not to hold contrary to its prior rulings in the same case, and there is nothing to indicate that there should be a departure from that doctrine here, the entirety of the files and records herein clearly demonstrating that the decision in United States v. Marchese was right.

10. The District Court was without jurisdiction to grant any Section 2255 or habeas corpus type of relief, since appellants were at all times herein relevant on bail and thus not "in custody" for the purpose of granting such varieties of relief.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Thomas H. Coleman

THOMAS H. COLEMAN